

**SUPREME COURT OF CANADA**

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| **Citation:** Doré *v*. Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395 | **Date:** 20120322  **Docket:** 33594 |

**Between:**

**Gilles Doré**

Appellant

and

**Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec,**

**Tribunal des professions and Attorney General of Quebec**

Respondents

- and -

**Federation of Law Societies of Canada, Canadian Civil Liberties Association**

**and Young Bar Association of Montreal**

Interveners

**Coram:** McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

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| **Reasons for Judgment:**  (paras. 1 to 72) | Abella J. (McLachlin C.J. and Binnie, LeBel, Fish, Rothstein and Cromwell JJ. concurring) |

Doré *v.* Barreau du Québec, 2012 SCC 12, [2012] 1 S.C.R. 395

Gilles Doré *Appellant*

v.

Pierre Bernard, in his capacity as Assistant Syndic of

the Barreau du Québec, Tribunal des professions and

Attorney General of Quebec *Respondents*

and

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**Indexed as: Doré *v.* Barreau du Québec**

2012 SCC 12

File No.: 33594.

2011:  January 26; 2012:  March 22.

Present: McLachlin C.J. and Binnie, LeBel, Fish, Abella, Rothstein and Cromwell JJ.

on appeal from the court of appeal for quebec

*Administrative law — Judicial review — Standard of review — Disciplinary council — Lawyer challenging constitutionality of council’s decision — Proper approach to judicial review of discretionary administrative decisions engaging Charter protections — Whether framework developed in R. v. Oakes appropriate to determine if discretionary administrative decisions comply with Canadian Charter of Rights and Freedoms.*

*Law of professions — Discipline — Barristers and solicitors — Lawyer writing private letter to judge and criticizing him — Disciplinary council finding lawyer in breach of duty to behave with objectivity, moderation and dignity and reprimanding him — Whether council properly balanced relevant Charter values with statutory objectives — Whether decision reasonable — Code of ethics of advocates, R.R.Q. 1981, c. B-1, r. 1, art. 2.03.*

D appeared before a judge of the Superior Court of Quebec on behalf of a client. In the course of D’s argument, the judge criticized D. In his written reasons rejecting D’s application, the judge levied further criticism, accusing D of using bombastic rhetoric and hyperbole, of engaging in idle quibbling, of being impudent and of doing nothing to help his client discharge his burden. D then wrote a private letter to the judge calling him loathsome, arrogant and fundamentally unjust, and accusing him of hiding behind his status like a coward, of having a chronic inability to master any social skills, of being pedantic, aggressive and petty, and of having a propensity to use his court to launch ugly, vulgar and mean personal attacks.

The Assistant Syndic of the Barreau du Québec filed a complaint against D based on that letter alleging that D had violated art. 2.03 of the *Code of ethics of advocates*, which states that the conduct of advocates “must bear the stamp of objectivity, moderation and dignity”. The Disciplinary Council of the Barreau du Québec found that the letter was likely to offend, rude and insulting, that the statements had little expressive value, and that the judge’s conduct, which resulted in a reprimand from the Canadian Judicial Council, could not be relied on as justification for it. The Council rejected D’s argument that art. 2.03 violated s. 2(*b*) of the *Canadian Charter of Rights and Freedoms*, finding that the limitation on freedom of expression was reasonable. Based on the seriousness of D’s conduct, the Council reprimanded D and suspended his ability to practice law for 21 days. On appeal to the Tribunal des professions, D abandoned his constitutional challenge to the specific provision, arguing instead that the sanction itself violated his freedom of expression. The Tribunal found that D had exceeded the objectivity, moderation and dignity expected of him and that the decision to sanction D was a minimal restriction on his freedom of expression. On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal.

Before the Quebec Court of Appeal, D no longer appealed the actual sanction of 21 days, challenging only the decision to reprimand him as a violation of the *Charter*. The Court of Appeal applied a full *Oakes* analysis under s. 1 of the *Charter* and upheld the reprimand. It found that D’s letter had limited importance compared to the values underlying freedom of expression, that the Council’s decision had a rational connection to the important objective of protecting the public and that the effects of the decision were proportionate to its objectives.

*Held*: The appeal from the result should be dismissed.

To determine whether administrative decision-makers have exercised their statutory discretion in accordance with *Charter* protections, the review should be in accordance with an administrative law approach, not a s. 1 *Oakes* analysis. The standard of review is reasonableness.

In assessing whether a law violates the *Charter*, we are balancing the government’s pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. But in assessing whether an adjudicated decision violates the *Charter*, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.

There is nothing in the administrative law approach which is inherently inconsistent with the strong protection of the *Charter*’s guarantees and values. An administrative law approach recognizes that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, and that administrative discretion is exercised in light of constitutional guarantees and the values they reflect. An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values and will generally be in the best position to consider the impact of the relevant *Charter* guarantee on the specific facts of the case. Under a robust conception of administrative law, discretion is exercised in light of constitutional guarantees and the values they reflect.

When applying *Charter* values in the exercise of statutory discretion, an administrative decision-maker must balance *Charter* values with the statutory objectives by asking how the *Charter* value at issue will best be protected in light of those objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives.

On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* rights and values at play. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a “margin of appreciation”, or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.

Here, the decision to suspend D for 21 days was not before the Court. The only issue was whether the Council’s decision to reprimand D reflected a proportionate balancing of the lawyer’s expressive rights with its statutory mandate to ensure that lawyers behave with “objectivity, moderation and dignity” in accordance with art. 2.03 of the *Code of ethics*. In dealing with the appropriate boundaries of civility for a lawyer, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular. We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer’s right to expression and the public’s interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.

Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. The fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer’s expressive rights under the *Charter*. This does not, however, argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility. Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer’s equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.

A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. Such criticism, even when it is expressed vigorously, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public’s reasonable expectations of a lawyer’s professionalism. As the Disciplinary Council found, D’s letter was outside those expectations. His displeasure with the judge was justifiable, but the extent of the response was not.

In light of the excessive degree of vituperation in the letter’s context and tone, the Council’s decision that D’s letter warranted a reprimand represented a proportional balancing of D’s expressive rights with the statutory objective of ensuring that lawyers behave with “objectivity, moderation and dignity”. The decision is, as a result, a reasonable one.

**Cases Cited**

**Discussed:** *Multani v. Commission scolaire Marguerite‑Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256; *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528; *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815; *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038; *R. v. Oakes*, [1986] 1 S.C.R. 103; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817; *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227; *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765; *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *United States v.* *Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281; **referred to:** *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5; *R. v. Lanthier*, 2001 CanLII 9351; *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567; *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3; *Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295; *R. v. Daviault*, [1994] 3 S.C.R. 63; *R. v. Swain*, [1991] 1 S.C.R. 933; *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130; *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640; *R.W.D.S.U., Local 558 v. Pepsi‑Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156; *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247; *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570; *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75; *RJR‑MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199; *R. v. Felderhof* (2003), 68 O.R. (3d) 481; *R. v. Kopyto* (1987), 62 O.R. (2d) 449; *Attorney‑General v. Times Newspapers Ltd.*, [1974] A.C. 273; *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74.

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APPEAL from a judgment of the Quebec Court of Appeal (Rochon, Dufresne and Léger JJ.A.), 2010 QCCA 24, [2010] R.J.Q. 77, 326 D.L.R. (4th) 749, [2010] Q.J. No. 88 (QL), 2010 CarswellQue 13368, affirming a decision of Déziel J., 2008 QCCS 2450 (CanLII), [2008] J.Q. no 5222 (QL), 2008 CarswellQue 5285, dismissing an application for judicial review of a decision of the Tribunal des professions, 2007 QCTP 152 (CanLII), [2007] D.T.P.Q. no 152 (QL). Appeal dismissed.

*Sophie Dormeau* and *Sophie Préfontaine*, for the appellant.

*Claude G. Leduc* and *Luce Bastien*, for the respondent Pierre Bernard, in his capacity as Assistant Syndic of the Barreau du Québec.

*Dominique A. Jobin* and *Noémi Potvin*, for the respondents Tribunal des professions and the Attorney General of Quebec.

*Babak Barin* and *Frédéric Côté*, for the intervener the Federation of Law Societies of Canada.

*David Grossman, Sylvain Lussier*, *Julien Morissette* and *Annie Gallant*, for the intervener the Canadian Civil Liberties Association.

*Mathieu Bouchard* and *Audrey Boctor*, for the intervener the Young Bar Association of Montreal.

The judgment of the Court was delivered by

1. Abella J. — The focus of this appeal is on the decision of a disciplinary body to reprimand a lawyer for the content of a letter he wrote to a judge after a court proceeding.
2. The lawyer does not challenge the constitutionality of the provision in the *Code of ethics* under which he was reprimanded. Nor, before us, does he challenge the length of the suspension he received. What he *does* challenge, is the constitutionality of the decision itself, claiming that it violates his freedom of expression under the *Canadian* *Charter of Rights and Freedoms*.
3. This raises squarely the issue of how to protect *Charter* guarantees and the values they reflect in the context of adjudicated administrative decisions. Normally, if a discretionary administrative decision is made by an adjudicator within his or her mandate, that decision is judicially reviewed for its reasonableness. The question is whether the presence of a *Charter* issue calls for the replacement of this administrative law framework with the *Oakes* test, the test traditionally used to determine whether the state has justified a law’s violation of the *Charter* as a “reasonable limit” under s. 1.
4. It seems to me to be possible to reconcile the two regimes in a way that protects the integrity of each. The way to do that is to recognize that an adjudicated administrative decision is not like a law which can, theoretically, be objectively justified by the state, making the traditional s. 1 analysis an awkward fit. On whom does the onus lie, for example, to formulate and assert the pressing and substantial objective of an adjudicated decision, let alone justify it as rationally connected to, minimally impairing of, and proportional to that objective? On the other hand, the protection of *Charter* guarantees is a fundamental and pervasive obligation, no matter which adjudicative forum is applying it. How then do we ensure this rigorous *Charter* protection while at the same time recognizing that the assessment must necessarily be adjusted to fit the contours of what is being assessed and by whom?
5. We do it by recognizing that while a formulaic application of the *Oakes* test may not be workable in the context of an adjudicated decision, distilling its essence works the same justificatory muscles: balance and proportionality. I see nothing in the administrative law approach which is inherently inconsistent with the strong *Charter* protection — meaning its guarantees and values — we expect from an *Oakes* analysis. The notion of deference in administrative law should no more be a barrier to effective *Charter* protection than the margin of appreciation is when we apply a full s. 1 analysis.
6. In assessing whether a law violates the *Charter*, we are balancing the government’s pressing and substantial objectives against the extent to which they interfere with the *Charter* right at issue. If the law interferes with the right no more than is reasonably necessary to achieve the objectives, it will be found to be proportionate, and, therefore, a reasonable limit under s. 1. In assessing whether an adjudicated decision violates the *Charter*, however, we are engaged in balancing somewhat different but related considerations, namely, has the decision-maker disproportionately, and therefore unreasonably, limited a *Charter* right. In both cases, we are looking for whether there is an appropriate balance between rights and objectives, and the purpose of both exercises is to ensure that the rights at issue are not unreasonably limited.
7. As this Court has noted, most recently in *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, the nature of the reasonableness analysis is always contingent on its context. In the *Charter* context, the reasonableness analysis is one that centres on proportionality, that is, on ensuring that the decision interferes with the relevant *Charter* guarantee no more than is necessary given the statutory objectives. If the decision is disproportionately impairing of the guarantee, it is unreasonable. If, on the other hand, it reflects a proper balance of the mandate with *Charter* protection, it is a reasonable one.
8. In this case, the discipline committee’s decision to reprimand the lawyer reflected a proportionate balancing of its public mandate to ensure that lawyers behave with “objectivity, moderation and dignity” with the lawyer’s expressive rights. It is, as a result, a reasonable one.

Background

1. Gilles Doré was counsel for Daniel Lanthier in criminal proceedings. On June 18 and 19, 2001, Mr. Doré appeared before Boilard J. in the Superior Court of Quebec seeking a stay of proceedings or, in the alternative, the release of his client on bail. In the course of Mr. Doré’s argument, Justice Boilard said about him that [translation] “an insolent lawyer is rarely of use to his client”. In his written reasons rejecting Mr. Doré’s application on June 21, 2001, Boilard J. levied further criticism (*R. v. Lanthier*, 2001 CanLII 9351). He accused Mr. Doré of [translation] “bombastic rhetoric and hyperbole” and said that the court must “put aside” Mr. Doré’s “impudence”. Justice Boilard characterized Mr. Doré’s request for a stay as “totally ridiculous” and one of his arguments as “idle quibbling”. Finally, he said that “fixated on or obsessed with his narrow vision of reality, which is not consistent with the facts, Mr. Doré has done nothing to help his client discharge his burden”.
2. On June 21, 2001, Mr. Doré wrote a private letter to Justice Boilard, stating:

[translation]

WITHOUT PREJUDICE OR ADMISSION

Sir,

I have just left the Court. Just a few minutes ago, as you hid behind your status like a coward, you made comments about me that were both unjust and unjustified, scattering them here and there in a decision the good faith of which will most likely be argued before our Court of Appeal.

Because you ducked out quickly and refused to hear me, I have chosen to write a letter as an entirely personal response to the equally personal remarks you permitted yourself to make about me. This letter, therefore, is from man to man and is outside the ambit of my profession and your functions.

If no one has ever told you the following, then it is high time someone did. Your chronic inability to master any social skills (to use an expression in English, that language you love so much), which has caused you to become pedantic, aggressive and petty in your daily life, makes no difference to me; after all, it seems to suit you well.

Your deliberate expression of these character traits while exercising your judicial functions, however, and your having made them your trademark concern me a great deal, and I feel that it is appropriate to tell you.

Your legal knowledge, which appears to have earned the approval of a certain number of your colleagues, is far from sufficient to make you the person you could or should be professionally. Your determination to obliterate any humanity from your judicial position, your essentially non-existent listening skills, and your propensity to use your court — where you lack the courage to hear opinions contrary to your own — to launch ugly, vulgar, and mean personal attacks not only confirms that you are as loathsome as suspected, but also casts shame on you as a judge, that most extraordinarily important function that was entrusted to you.

I would have very much liked to say this to your face, but I highly doubt that, given your arrogance, you are able to face your detractors without hiding behind your judicial position.

Worst of all, you possess the most appalling of all defects for a man in your position: You are fundamentally unjust. I doubt that that will ever change.

Sincerely,

Gilles Doré

P.S. As this letter is purely personal, I see no need to distribute it.

(C.A. judgment, 2010 QCCA 24, 326 D.L.R. (4th) 749, at para. 5)

1. The next day, June 22, 2001, Mr. Doré wrote to Chief Justice Lyse Lemieux, with a copy to Justice Boilard. He made it clear that he was not filing a complaint with her against Justice Boilard. Instead, Mr. Doré respectfully requested that he not be required to appear before Justice Boilard in the future since he was concerned that he could not properly represent his clients before him.
2. On July 10, 2001, Mr. Doré complained to the Canadian Judicial Council about Justice Boilard’s conduct. On July 13, 2001, Chief Justice Lemieux sent a copy of the letter Mr. Doré had sent to Justice Boilard to the Syndic du Barreau, the body that disciplines lawyers in Quebec.
3. In March 2002, the Assistant Syndic filed a complaint against Mr. Doré based on his letter to Justice Boilard. The complaint alleged that Mr. Doré had violated both art. 2.03 of the *Code of ethics of advocates*, R.R.Q. 1981, c. B-1, r. 1, and Mr. Doré’s oath of office. Article 2.03 stated: “The conduct of an advocate must bear the stamp of objectivity, moderation and dignity.”
4. In the interval between the filing of the Assistant Syndic’s complaint against Mr. Doré and the actual proceedings against him, a committee of judges appointed by the Judicial Council to look into Mr. Doré’s complaint communicated its conclusions to Mr. Doré and Justice Boilard in letters sent on July 15, 2002. The committee found that Justice Boilard had made [translation] “unjustified derogatory remarks to Mr. Doré” stating, in part:

[translation] . . . to use the words “bombastic rhetoric and hyperbole” and “impudence” in referring to counsel arguing a case before you, quite clearly in good faith, is unnecessarily insulting. To reply to counsel who submits that you have not allowed him to argue his case “that an insolent lawyer is rarely of use to his client” not only is unjustified in the circumstances, but could tarnish counsel’s professional reputation in the eyes of his client, his peers and the public. To say to counsel arguing a case before you that “I have the impression this is going to be tiresome” is to gratuitously degrade him. To describe a procedure before the court as “totally ridiculous” is unnecessarily humiliating. It is the panel’s opinion that such comments would seem to show contempt for counsel not only as an individual but also as a professional.

The evidence reveals a flagrant lack of respect for an officer of the court, namely Mr. Doré, who was nevertheless at all times respectful to the court. The evidence also shows signs of impatience on your part that are surprising in light of every judge’s duty to listen calmly to the parties and to counsel. It is the panel’s opinion that in so abusing your power as a judge, you not only tarnished your image as a dispenser of justice, but also undermined the judiciary, the image of which has unfortunately been diminished. The panel reminds you that your independence and your authority as a judge do not exempt you from respecting the dignity of every individual who argues a case before you. Dispensing justice while gratuitously insulting counsel is befitting neither for the judge nor for the judiciary.

Having also read the judgments of the Quebec Court of Appeal in *R. v. Proulx*, *R. v. Bisson* and *R. v. Callochia*, the panel observed that you tend to use your platform to unjustly denigrate counsel appearing before you. The transcript of the hearing of April 9, 2002 in *Sa Majesté la Reine v. Sébastien Beauchamp*, which contains evidence of personal attacks on another lawyer, also confirmed that the case raised in Mr. Doré’s complaint is neither unique nor isolated, but shows that extreme conduct and comments seem to form part of a more generalized attitude. In the panel’s view, the fact that such an attitude could persist despite warnings from the Court of Appeal is troubling.

The panel finds that the impatience you showed and the immoderate comments you made to an officer of the court, Mr. Doré, are unacceptable and merit an expression of the panel’s disapproval under subsection 55(2) of the Canadian Judicial Council By-Laws.

The panel notes that you have deferred to its decision and assumes that the fact that Mr. Doré has made a complaint will lead you to reflect on this and will remind you of your duty as a judge to show respect and courtesy to all counsel who appear before you.

1. On July 22, 2002, after receiving this reprimand, Justice Boilard recused himself from a complex criminal trial involving the Hell’s Angels, a trial related to the trial of Daniel Lanthier in which Mr. Doré had acted. As a result of this recusal, the Attorney General of Quebec requested the Canadian Judicial Council to conduct an inquiry. The Judicial Council concluded that Justice Boilard’s recusal had not constituted misconduct.
2. As for Mr. Doré, the proceedings before the Disciplinary Council of the Barreau du Québec took place between April 2003 and January 2006. In its January 18, 2006 decision, the Disciplinary Council found that Mr. Doré’s letter was [translation] “likely to offend and is rude and insulting” (2006 CanLII 53416, at para. 58). It concluded that his statements had little expressive value, as they were “merely opinions, perceptions and insults” (para. 62). The Disciplinary Council rejected Mr. Doré’s submission that his letter was private, since it was written by him as a lawyer. It also concluded that Justice Boilard’s conduct could not be relied on as justification for the letter.
3. The Disciplinary Council rejected Mr. Doré’s argument that art. 2.03 violated s. 2(*b*) of the *Charter*. While acknowledging that the provision infringed on freedom of expression, the Disciplinary Council found that

[translation] [t]his is a limitation on freedom of expression that is entirely reasonable, even necessary, in the Canadian legal system, where lawyers and judges must work together in the interest of justice. [para. 88]

Moreover, it concluded that Mr. Doré had willingly joined a profession that was subject to rules of discipline that he knew would limit his freedom of expression. While the rules may [translation] “be seen as restrictions imposed on the members of the Barreau in comparison to the freedom that may be enjoyed by other Canadian citizens”, they are made in exchange for “the privileges conferred on lawyers as members of an ‘exclusive profession’” (paras. 109-10). On July 24, 2006, based on what it found to be the seriousness of Mr. Doré’s conduct and on his failure to show remorse, the same panel suspended Mr. Doré’s ability to practise law for 21 days (2006 CanLII 53436).

1. Mr. Doré appealed the Disciplinary Council’s decisions to the Tribunal des professions on several grounds (2007 QCTP 152 (CanLII)). This time, he did not challenge the constitutionality of art. 2.03. Instead, he argued that the manner in which the relevant legislation was applied by the Disciplinary Council was unconstitutional because his comments were protected by s. 2(*b*) of the *Charter*.
2. The Tribunal reviewed the constitutionality of the Disciplinary Council’s decision on a standard of correctness, but said that a full *Oakes* analysis under s. 1 of the *Charter* was inappropriate where a decision only applied to one person. Instead, it held that “[t]he issue becomes one of proportionality or, more specifically, minimal limitation of the guaranteed right” (para. 69, citing *Multani v. Commission scolaire Marguerite-Bourgeoys*, 2006 SCC 6, [2006] 1 S.C.R. 256, at para. 155). In the circumstances, the Disciplinary Council’s decision to sanction Mr. Doré was found to be a [translation] “minimal restriction on freedom of expression” (para. 76). It rejected Mr. Doré’s argument that Justice Boilard’s disparaging remarks justified his letter. It also rejected his argument that the letter was private, since Mr. Doré remained “an officer of the court and a lawyer” (para. 77) and had exceeded the objectivity, moderation and dignity expected of him. Though it noted that the sanction imposed by the Disciplinary Council “seems harsh” (para. 135), the Tribunal held that it was not unreasonable, given the gravity of Mr. Doré’s conduct and his lack of remorse.
3. On judicial review, the Superior Court of Quebec upheld the decision of the Tribunal, including its view that the letter did not constitute a private act, and found the Tribunal’s reasoning to be [translation] “unassailable” (2008 QCCS 2450 (CanLII), at paras. 105, 109, 139 and 147). It concluded that by finding the decision to be a minimal restriction on Mr. Doré’s freedom of expression, the Tribunal had “implicitly” held that the restriction was “justified in a free and democratic society” (para. 104).
4. The Quebec Court of Appeal held that given the status and role of the parties, Mr. Doré could not reasonably have expected his letter to remain confidential or private. It acknowledged that the Disciplinary Council’s decision was a breach of s. 2(*b*), but, applying a full s. 1 analysis, it found that Mr. Doré’s letter had [translation] “limited importance . . . compared to the values underlying freedom of expression, which are the pursuit of truth, participation in the community, individual self-fulfillment, and human flourishing” (para. 36). The court held that protecting the public was an important objective, and that the Disciplinary Council’s decision had a rational connection with that objective, especially given the importance of a judge’s position in the judicial system. On minimal impairment, assessing both the decision and the sanction, the Court of Appeal held that while the sanction was significant, it was targeted at the manner in which Mr. Doré criticized Justice Boilard, and did not prohibit the expression itself:

[translation] The impugned decision appears to be measured and, in the present case, is a correct application of section 2.03 of the *Code of ethics*. The sanction is significant (suspension of the right to practice for twenty-one days). It also involves the stigma attached to disciplinary guilt. It is not, however, unreasonable. In my view, it is a measured sanction of a lawyer who has been found guilty of a serious ethical offence. [para. 47]

It concluded by finding that the effects of the decision were proportionate to its objectives.

Analysis

1. Mr. Doré’s argument rests on his assertion that the finding of a breach of the *Code of ethics* violates the expressive rights protected by s. 2(*b*) of the *Charter*. Because the 21-day suspension had already been served when he was before the Court of Appeal, he did not appeal the penalty. The reasonableness of its length, therefore, is not before us.
2. It is clear from the decisions of the Tribunal and the reviewing courts in this case that there is some confusion about the appropriate framework to be applied in reviewing administrative decisions for compliance with *Charter* values. Some courts have used the same s. 1 *Oakes* analysis used for determining whether a law complies with the *Charter*; others have used a classic judicial review approach.
3. It goes without saying that administrative decision-makers must act consistently with the values underlying the grant of discretion, including *Charter* values (see *Chamberlain v. Surrey School District No. 36*, 2002 SCC 86, [2002] 4 S.C.R. 710, at para. 71; *Pinet v. St. Thomas Psychiatric Hospital*, 2004 SCC 21, [2004] 1 S.C.R. 528, at paras. 19-23; and *Ontario (Public Safety and Security) v. Criminal Lawyers’ Association*, 2010 SCC 23, [2010] 1 S.C.R. 815, at paras. 62-75). The question then is what framework should be used to scrutinize how those values were applied?
4. In *Slaight Communications Inc. v. Davidson*, [1989] 1 S.C.R. 1038,Lamer J., in his concurring reasons, said that the *Charter* applied to a labour adjudicator’s decision and used the s. 1 framework developed in *R. v. Oakes*, [1986] 1 S.C.R. 103, to determine if the decision complied with the *Charter*. Writing for the majority, Dickson C.J. agreed with Lamer J. that the *Charter* applied to administrative decision-making. But while he applied the *Oakes* framework, he notably and presciently observed that “[t]he precise relationship between the traditional standard of administrative law review of patent unreasonableness and the new constitutional standard of review will be worked out in future cases” (p. 1049 (emphasis added)).
5. Yet the approach taken in *Slaight* can only be properly understood in its context. Importantly, when Lamer J. held that discretionary administrative decisions implicating *Charter* values should be reviewed under the *Oakes* analysis, he did so in the context of the perceived inability of administrative law to deal with *Charter* infringements in the exercise of discretion. This concern permeates the reasons in *Slaight*. As Prof. Geneviève Cartier has noted:

. . . while Lamer J thought the administrative law standard was ill-suited to *Charter* challenges because of its inability to inquire into the substance of discretionary decisions, Dickson CJ thought it was ill-suited because of its inability to properly unravel the value inquiries involved in any *Charter* litigation.

(“The *Baker* Effect: A New Interface Between the *Canadian Charter of Rights and Freedoms* and Administrative Law — The Case of Discretion”, in David Dyzenhaus, ed., *The Unity of Public Law* (2004), 61, at p. 68)

1. The approach taken in *Slaight* attracted academic concern from administrative law scholars. Prof. John Evans argued that if courts were too quick to bypass administrative law in favour of the *Charter*, “a rich source of thought and experience about law and government will be overlooked or lost altogether” (“The Principles of Fundamental Justice: The Constitution and the Common Law” (1991), 29 *Osgoode Hall L.J.* 51, at p. 73). Similarly, Prof. Cartier suggested that the *Slaight* approach reduced the role of administrative law to the “formal determination of jurisdiction on the basis of statutory interpretation”, which prevented the control of discretion with reference to “values” and presented “an impoverished picture of administrative law” (pp. 68-69).
2. The scope of the review of discretionary administrative decisions that provided the backdrop for the decision in *Slaight* was altered by this Court’s decision in *Baker v. Canada (Minister of Citizenship and Immigration)*,[1999] 2 S.C.R. 817, at para. 65. In that case, L’Heureux-Dubé J. concluded that administrative decision-makers were required to take into account fundamental Canadian values, including those in the *Charter*, when exercising their discretion (*Baker*, at paras. 53-56).
3. Building on the decision in *Canadian Union of Public Employees, Local 963 v. New Brunswick Liquor Corp.*, [1979] 2 S.C.R. 227 (“*C.U.P.E.*”), *Baker* represented a further shift away from Diceyan principles. By recognizing that administrative decision-makers are both bound by fundamental values and empowered to adjudicate them, *Baker* ceded interpretive authority on those issues to those decision-makers (David Dyzenhaus and Evan Fox-Decent, “Rethinking the Process/Substance Distinction: *Baker* v. *Canada*” (2001), 51 *U.T.L.J.* 193, at p. 240). This allows the *Charter* to “nurture” administrative law, by emphasizing that *Charter* values infuse the inquiry (Cartier, at pp. 75 and 86; see also Mary Liston, “Governments in Miniature: The Rule of Law in the Administrative State”, in Colleen M. Flood and Lorne Sossin, eds., *Administrative Law in Context* (2008), 77, at p. 100; Susan L. Gratton and Lorne Sossin, “In Search of Coherence: The *Charter* and Administrative Law under the McLachlin Court”, in David A. Wright and Adam M. Dodek, eds., *Public Law at the McLachlin Court: The First Decade* (2011), 145, at pp. 157-58).
4. When this is weighed together with this Court’s subsequent decisions, we see a completely revised relationship between the *Charter*, the courts, and administrative law than the one first encountered in *Slaight*. In *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, the Court held that judicial review should be guided by a policy of deference, justified on the basis of legislative intent, respect for the specialized expertise of administrative decision-makers, and recognition that courts do not have a monopoly on adjudication in the administrative state (para. 49). And in *R. v. Conway*, 2010 SCC 22, [2010] 1 S.C.R. 765, at paras. 78-82, building on the development of the jurisprudence, the Court found that administrative tribunals with the power to decide questions of law have the authority to apply the *Charter* and grant *Charter* remedies that are linked to matters properly before them.
5. But, as predicted by Chief Justice Dickson, this Court has explored different ways to review the constitutionality of administrative decisions, vacillating between the values-based approach in *Baker* and the more formalistic template in *Slaight*. The s. 1 *Oakes* approach suggested by Lamer J., was followed in *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483; *Dagenais v. Canadian Broadcasting Corp.*, [1994] 3 S.C.R. 835; *Ross v. New Brunswick School District No. 15*, [1996] 1 S.C.R. 825; *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624; *Little Sisters Book and Art Emporium v. Canada (Minister of Justice)*, 2000 SCC 69, [2000] 2 S.C.R. 1120; *United States v. Burns*, 2001 SCC 7, [2001] 1 S.C.R. 283; and *R. v. Mentuck*, 2001 SCC 76, [2001] 3 S.C.R. 442.
6. Other cases, and particularly recently, have instead applied an administrative law/judicial review analysis in assessing whether the decision-maker took sufficient account of *Charter* values. This approach is seen in *Baker*; *Trinity Western University v. British Columbia College of Teachers*, 2001 SCC 31, [2001] 1 S.C.R. 772; *Chamberlain*; *Ahani v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 2, [2002] 1 S.C.R. 72; *Pinet*; *Lake v. Canada (Minister of Justice)*, 2008 SCC 23, [2008] 1 S.C.R. 761; *Canada (Prime Minister) v. Khadr*, 2010 SCC 3, [2010] 1 S.C.R. 44; *Criminal Lawyers’ Association*; and *Németh v. Canada (Justice)*, 2010 SCC 56, [2010] 3 S.C.R. 281.
7. The last decision of this Court to use the full s. 1 *Oakes* approach to determine whether the exercise of statutory discretion complied with the *Charter* was *Multani*. The academic commentary that followed was consistently critical. In brief, it generally argued that the use of a strict s. 1 analysis reduced administrative law to having a formal role in controlling the exercise of discretion (see Gratton and Sossin, at p. 157; David Mullan, “Administrative Tribunals and Judicial Review of *Charter* Issues after *Multani*” (2006), 21 *N.J.C.L.* 127; Stéphane Bernatchez, “Les rapports entre le droit administratif et les droits et libertés: la révision judiciaire ou le contrôle constitutionnel?” (2010), 55 *McGill L.J.* 641).
8. Since then, and largely as a result of the revised administrative law template found in *Dunsmuir*, this Court appears to have moved away from *Multani*, leading to the suggestion that it may have “decided to start from ground zero in building coherence in public law” (Gratton and Sossin, at p. 161). Today, the Court has two options for reviewing discretionary administrative decisions that implicate *Charter* values. The first is to adopt the *Oakes* framework, developed for reviewing laws for compliance with the Constitution. This undoubtedly protects *Charter* rights, but it does so at the risk of undermining a more robust conception of administrative law. In the words of Prof. Evans, if administrative law is bypassed for the *Charter*, “a rich source of thought and experience about law and government will be overlooked” (p. 73).
9. The alternative is for the Court to embrace a richer conception of administrative law, under which discretion is exercised “in light of constitutional guarantees and the values they reflect” (*Multani*, at para. 152, *per* LeBel J.). Under this approach, it is unnecessary to retreat to a s. 1 *Oakes* analysis in order to protect *Charter* values. Rather, administrative decisions are *always* required to consider fundamental values. The *Charter* simply acts as “a reminder that some values are clearly fundamental and . . . cannot be violated lightly” (Cartier, at p. 86). The administrative law approach also recognizes the legitimacy that this Court has given to administrative decision-making in cases such as *Dunsmuir* and *Conway*. These cases emphasize that administrative bodies are empowered, and indeed required, to consider *Charter* values within their scope of expertise. Integrating *Charter* values into the administrative approach, and recognizing the expertise of these decision-makers, opens “an institutional dialogue about the appropriate use and control of discretion, rather than the older command-and-control relationship” (Liston, at p. 100).
10. As explained by Chief Justice McLachlin in *Alberta v. Hutterian Brethren of Wilson Colony*, 2009 SCC 37, [2009] 2 S.C.R. 567, the approach used when reviewing the constitutionality of a law should be distinguished from the approach used for reviewing an administrative decision that is said to violate the rights of a particular individual (see also Bernatchez). When *Charter* values are applied to an individual administrative decision, they are being applied in relation to a particular set of facts. *Dunsmuir* tells us this should attract deference (para. 53; see also *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 S.C.R. 3, at para. 39). When a particular “law” is being assessed for *Charter* compliance, on the other hand, we are dealing with principles of general application.
11. The more flexible administrative approach to balancing *Charter* values is also more consistent with the nature of discretionary decision-making. Some of the aspects of the *Oakes* test are, in any event, poorly suited to the review of discretionary decisions, whether of judges or administrative decision-makers. For instance, the requirement under s. 1 that a limit be “prescribed by law” has been held by this Court to apply to norms where “their adoption is authorized by statute, they are binding rules of general application, and they are sufficiently accessible and precise to those to whom they apply” (*Greater Vancouver Transportation Authority v. Canadian Federation of Students — British Columbia Component*, 2009 SCC 31, [2009] 2 S.C.R. 295, at para. 53).
12. Moreover, when exercising discretion under a provision or statutory scheme whose constitutionality is not impugned, it is conceptually difficult to see what the “pressing and substantial” objective of a decision is, or who would have the burden of defining and defending it.
13. This Court has already recognized the difficulty of applying the *Oakes* framework beyond the context of reviewing a law or other rule of general application. This has been the case in applying *Charter* values to the common law, “where there is no specific enactment that can be examined in terms of objective, rational connection, least drastic means and proportionate effect” (Peter W. Hogg, *Constitutional Law of Canada* (5th ed. Supp.), vol. 2, at section 38.15). In *R. v. Daviault*, [1994] 3 S.C.R. 63, for example, in assessing the common law rule relating to establishing intent under extreme intoxication, the Court held that no *Oakes* analysis was required when reviewing a common law rule for compliance with *Charter* values:

If a new common law rule could be enunciated which would not interfere with an accused person’s right to have control over the conduct of his or her defence, I can see no conceptual problem with the Court’s simply enunciating such a rule to take the place of the old rule, without considering whether the old rule could nonetheless be upheld under s. 1 of the *Charter*. Given that the common law rule was fashioned by judges and not by Parliament or a legislature, judicial deference to elected bodies is not an issue. If it is possible to reformulate a common law rule so that it will not conflict with the principles of fundamental justice, such a reformulation should be undertaken. [pp. 93-94, citing *R. v. Swain*, [1991] 1 S.C.R. 933, at p. 978.]

1. In *Hill v. Church of Scientology of Toronto*, [1995] 2 S.C.R. 1130, this Court explicitly rejected the use of the s. 1 *Oakes* framework in developing the common law of defamation for two reasons. First, when interpreting a common law rule, there is no violation of a *Charter* right, but a conflict between principles, so “the balancing must be more flexible than the traditional s. 1 analysis”, with *Charter* values providing the guidelines for any modification to the common law (para. 97). Second, the Court noted that “the division of onus which normally operates in a *Charter* challenge” was not appropriate for private litigation under the common law, as the party seeking to change the common law should not be allowed to benefit from a reverse onus (para. 98). As a result, the Court went on to “consider the common law of defamation in light of the values underlying the *Charter*” (para. 99). And in *Grant v. Torstar Corp.*, 2009 SCC 61, [2009] 3 S.C.R. 640, the Court relied on *Charter* values in introducing the new defence of responsible communication on matters of public interest to the law of defamation, without engaging in an *Oakes* analysis.
2. A further example is found in *R.W.D.S.U., Local 558 v. Pepsi-Cola Canada Beverages (West) Ltd.*, 2002 SCC 8, [2002] 1 S.C.R. 156, where the Court dealt with the common law of secondary picketing. After concluding that freedom of expression was engaged, the Court did not embark on an *Oakes* analysis. Instead, it found that the appropriate question was “which approach [to regulating secondary picketing] best balances the interests at stake in a way that conforms to the fundamental values reflected in the *Charter*?” (para. 65).
3. Though each of these cases engaged *Charter* values, the Court did not see the *Oakes* test as the vehicle for balancing whether those values were taken into sufficient account. The same is true, it seems to me, in the administrative law context, where decision-makers are called upon to exercise their statutory discretion in accordance with *Charter* protections.
4. What is the impact of this approach on the standard of review that applies when assessing the compliance of an administrative decision with *Charter* values? There is no doubt that when a tribunal is determining the constitutionality of a law, the standard of review is correctness (*Dunsmuir*, at para. 58). It is not at all clear to me, however, based on this Court’s jurisprudence, that correctness should be used to determine whether an administrative decision-maker has taken sufficient account of *Charter* values in making a discretionary decision.
5. This Court elaborated on the applicable standard of review to legal disciplinary panels in the pre-*Dunsmuir* decision of *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, where Iacobucci J. adopted a reasonableness standard in reviewing a sanction imposed for professional misconduct:

Although there is a statutory appeal from decisions of the Discipline Committee, the expertise of the Committee, the purpose of its enabling statute, and the nature of the question in dispute all suggest a more deferential standard of review than correctness. These factors suggest that the legislator intended that the Discipline Committee of the self-regulating Law Society should be a specialized body with the primary responsibility to promote the objectives of the Act by overseeing professional discipline and, where necessary, selecting appropriate sanctions. In looking at all the factors as discussed in the foregoing analysis, I conclude that the appropriate standard is reasonableness *simpliciter*. Thus, on the question of the appropriate sanction for professional misconduct, the Court of Appeal should not substitute its own view of the “correct” answer but may intervene only if the decision is shown to be unreasonable. [Emphasis added; para. 42.]

1. It seems to me that applying the *Dunsmuir* principles results in reasonableness remaining the applicable review standard for disciplinary panels. The issue then is whether this standard should be different when what is assessed is the disciplinary body’s application of *Charter* protections in the exercise of its discretion. In my view, the fact that *Charter* interests are implicated does not argue for a different standard.
2. The starting point is the expertise of the tribunals in connection with their home statutes. Citing Prof. David Mullan, *Dunsmuir* confirmed the importance of recognizing that

those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime . . . .

(para. 49, citing “Establishing the Standard of Review: The Struggle for Complexity?” (2004), 17 *C.J.A.L.P.* 59, at p. 93.)

And, as Prof. Evans has noted, the “reasons for judicial restraint in reviewing agencies’ decisions on matters in which their expertise is relevant do not lose their cogency simply because the question in issue also has a constitutional dimension” (p. 81).

1. An administrative decision-maker exercising a discretionary power under his or her home statute, has, by virtue of expertise and specialization, particular familiarity with the competing considerations at play in weighing *Charter* values. As the Court explained in *Douglas/Kwantlen Faculty Assn. v. Douglas College*, [1990] 3 S.C.R. 570, adopting the observations of Prof.Danielle Pinard:

[translation] . . . administrative tribunals have the skills, expertise and knowledge in a particular area which can with advantage be used to ensure the primacy of the Constitution. Their privileged situation as regards the appreciation of the relevant facts enables them to develop a functional approach to rights and freedoms as well as to general constitutional precepts.

(p. 605, citing “Le pouvoir des tribunaux administratifs québécois de refuser de donner effet à des textes qu’ils jugent inconstitutionnels” (1987-88), *McGill* *L.J.* 170, at pp. 173-74.)

1. This case, among others, reflected the increasing recognition by this Court of the distinct advantage that administrative bodies have in applying the *Charter* to a specific set of facts and in the context of their enabling legislation (see *Conway*, at paras. 79-80). As Major J. noted in dissent in *Mooring v. Canada (National Parole Board)*, [1996] 1 S.C.R. 75,tailoring the *Charter* to a specific situation “is more suited to a tribunal’s special role in determining rights on a case by case basis in the tribunal’s area of expertise” (para. 64; see also *C.U.P.E.*,at pp. 235-36).
2. These principles led the Court to apply a reasonableness standard in *Chamberlain*, where McLachlin C.J. found that a school board had acted unreasonably in refusing to approve the use of books depicting same-sex parented families. She held that the board had failed to respect the “values of accommodation, tolerance and respect for diversity” which were incorporated into its enabling legislation and “reflected in our Constitution’s commitment to equality and minority rights” (para. 21). Similarly, in *Pinet*, Binnie J. used a reasonableness standard to review, for compliance with s. 7 of the *Charter*,a decision of the Ontario Review Board to return the appellant to a maximum security hospital, observing that a reasonableness review best reflected “the expertise of the members appointed to Review Boards” (para. 22). The purpose of the exercise was to determine whether the decision was “the least onerous and least restrictive” of the liberty interests of the appellant while considering “public safety, the mental condition and other needs of the individual concerned, and his or her potential reintegration into society” (paras. 19 and 23). In *Pinet*, the test was laid out in the statute, but Binnie J. made it clear that the emphasis on the least infringing decision was a constitutional requirement.
3. In *Lake*, where the Court was reviewing the Minister’s decision to surrender a Canadian citizen for extradition, implicating ss. 6(1) and 7 of the *Charter*, the Court again applied a reasonableness standard. LeBel J. held that deference is owed to the Minister’s decision, as the Minister is closer to the relevant facts required to balance competing considerations and benefits from expertise:

This Court has repeatedly affirmed that deference is owed to the Minister’s decision whether to order surrender once a fugitive has been committed for extradition. The issue in the case at bar concerns the standard to be applied in reviewing the Minister’s assessment of a fugitive’s *Charter* rights. Reasonableness is the appropriate standard of review for the Minister’s decision, regardless of whether the fugitive argues that extradition would infringe his or her rights under the *Charter*. As is evident from this Court’s jurisprudence, to ensure compliance with the *Charter* in the extradition context, the Minister must balance competing considerations, and where many such considerations are concerned, the Minister has superior expertise. The assertion that interference with the Minister’s decision will be limited to exceptional cases of “real substance” reflects the breadth of the Minister’s discretion; the decision should not be interfered with unless it is unreasonable (*Schmidt* [*Canada v. Schmidt*, [1987] 1 S.C.R. 500]) (for comments on the standards of correctness and reasonableness, see *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9). [Emphasis added; para. 34.]

1. The alternative — adopting a correctness review in every case that implicates *Charter* values — will, as Prof. Mullan noted, essentially lead to courts “retrying” a range of administrative decisions that would otherwise be subjected to a reasonableness standard:

If correctness review becomes the order of the day in all *Charter* contexts, including the determination of factual issues and the application of the law to those facts, then what in effect can occur is that the courts will perforce assume the role of a *de novo* appellate body from all tribunals the task of which is to make decisions that of necessity have an impact on *Charter* rights and freedoms: Review Boards, Parole Boards, prison disciplinary tribunals, child welfare authorities, and the like. Whether that kind of judicial micro-managing of aspects of the administrative process should take place is a highly problematic question. [Emphasis added; p. 145.]

1. So our choice is between saying that every time a party argues that *Charter* values are implicated on judicial review, a reasonableness review is transformed into a correctness one, or saying that while both tribunals and courts can interpret the *Charter*, the administrative decision-maker has the necessary specialized expertise and discretionary power in the area where the *Charter* values are being balanced.
2. The decisions of legal disciplinary bodies offer a good example of the problem of applying a correctness review whenever *Charter* values are implicated. Most breaches of art. 2.03 of the *Code of ethics* calling for “objectivity, moderation and dignity”, necessarily engage the expressive rights of lawyers. That would mean that most exercises of disciplinary discretion under this provision would be transformed from the usual reasonableness review to one for correctness.
3. Nevertheless, as McLachlin C.J. noted in *Catalyst*, “reasonableness must be assessed in the context of the particular type of decision making involved and all relevant factors. It is an essentially contextual inquiry” (para. 18). Deference is still justified on the basis of the decision-maker’s expertise and its proximity to the facts of the case. Even where *Charter* values are involved, the administrative decision-maker will generally be in the best position to consider the impact of the relevant *Charter* values *on the specific facts of the case*. But both decision-makers and reviewing courts must remain conscious of the fundamental importance of *Charter* values in the analysis.
4. How then does an administrative decision-maker apply *Charter* values in the exercise of statutory discretion? He or she balances the *Charter* values with the statutory objectives. In effecting this balancing, the decision-maker should first consider the statutory objectives. In *Lake*, for instance, the importance of Canada’s international obligations, its relationships with foreign governments, and the investigation, prosecution and suppression of international crime justified the *prima facie*infringement of mobility rights under s. 6(1)  (para. 27). In *Pinet*, the twin goals of public safety and fair treatment grounded the assessment of whether an infringement of an individual’s liberty interest was justified (para. 19).
5. Then the decision-maker should ask how the *Charter* value at issue will best be protected in view of the statutory objectives. This is at the core of the proportionality exercise, and requires the decision-maker to balance the severity of the interference of the *Charter* protection with the statutory objectives. This is where the role of judicial review for reasonableness aligns with the one applied in the *Oakes* context. As this Court recognized in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, at para. 160, “courts must accord some leeway to the legislator” in the *Charter* balancing exercise, and the proportionality test will be satisfied if the measure “falls within a range of reasonable alternatives”. The same is true in the context of a review of an administrative decision for reasonableness, where decision-makers are entitled to a measure of deference so long as the decision, in the words of *Dunsmuir*, “falls within a range of possible, acceptable outcomes” (para. 47).
6. On judicial review, the question becomes whether, in assessing the impact of the relevant *Charter* protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the *Charter* protections at play. As LeBel J. noted in *Multani*, when a court is faced with reviewing an administrative decision that implicates *Charter* rights, “[t]he issue becomes one of proportionality” (para. 155), and calls for integrating the spirit of s. 1 into judicial review. Though this judicial review is conducted within the administrative framework, there is nonetheless conceptual harmony between a reasonableness review and the *Oakes* framework, since both contemplate giving a “margin of appreciation”, or deference, to administrative and legislative bodies in balancing *Charter* values against broader objectives.
7. If, in exercising its statutory discretion, the decision-maker has properly balanced the relevant *Charter* value with the statutory objectives, the decision will be found to be reasonable.

Application

1. The *Charter* value at issue in this appeal is expression, and, specifically, how it should be applied in the context of a lawyer’s professional duties.
2. At the relevant time, art. 2.03 of the *Code of ethics* (now modified as art. 2.00.01, O.C. 351-2004, (2004) 136 G.O. II, 1272) stated that “[t]he conduct of an advocate must bear the stamp of objectivity, moderation and dignity”. This provision, whose constitutionality is not impugned before us, sets out a series of broad standards that are open to a wide range of interpretations. The determination of whether the actions of a lawyer violate art. 2.03 in a given case is left entirely to the Disciplinary Council’s discretion.
3. No party in this dispute challenges the importance of professional discipline to prevent incivility in the legal profession, namely “potent displays of disrespect for the participants in the justice system, beyond mere rudeness or discourtesy” (Michael Code, “Counsel’s Duty of Civility: An Essential Component of Fair Trials and an Effective Justice System” (2007), 11 *Can. Crim. L.R.* 97, at p. 101; see also Gavin MacKenzie, *Lawyers and Ethics: Professional Responsibility and Discipline* (5th ed. 2009), at p. 8-1). The duty to encourage civility, “both inside and outside the courtroom”, rests with the courts and with lawyers (*R. v. Felderhof* (2003), 68 O.R. (3d) 481 (C.A.), at para. 83).
4. As a result, rules similar to art. 2.03 are found in codes of ethics that govern the legal profession throughout Canada. The Canadian Bar Association’s *Code of Professional Conduct* (2009), for example, states that a “lawyer should at all times be courteous, civil, and act in good faith to the court or tribunal and to all persons with whom the lawyer has dealings in the course of an action or proceeding” (c. IX, at para. 16; see also Law Society of Upper Canada, *Rules of Professional Conduct* (updated 2011), r. 6.03(5)).
5. But in dealing with the appropriate boundaries of civility, the severity of the conduct must be interpreted in light of the expressive rights guaranteed by the *Charter*, and, in particular, the public benefit in ensuring the right of lawyers to express themselves about the justice system in general and judges in particular (MacKenzie, at p. 26-1; *R. v. Kopyto* (1987), 62 O.R. (2d) 449 (C.A.); and *Attorney-General v. Times Newspapers Ltd.*, [1974] A.C. 273 (H.L.)).
6. In *Histed v. Law Society of Manitoba*, 2007 MBCA 150, 225 Man. R. (2d) 74, where Steel J.A. upheld a disciplinary decision resulting from a lawyer’s criticism of a judge, the critical role played by lawyers in assuring the accountability of the judiciary was acknowledged:

Not only should the judiciary be accountable and open to criticism, but lawyers play a very unique role in ensuring that accountability. As professionals with special expertise and officers of the court, lawyers are under a special responsibility to exercise fearlessness in front of the courts. They must advance their cases courageously, and this may result in criticism of proceedings before or decisions by the judiciary. The lawyer, as an intimate part of the legal system, plays a pivotal role in ensuring the accountability and transparency of the judiciary. To play that role effectively, he/she must feel free to act and speak without inhibition and with courage when the circumstances demand it. [Emphasis added; para. 71.]

1. Proper respect for these expressive rights may involve disciplinary bodies tolerating a degree of discordant criticism. As the Ontario Court of Appeal observed in a different context in *Kopyto*, the fact that a lawyer is criticizing a judge, a tenured and independent participant in the justice system, may raise, not lower, the threshold for limiting a lawyer’s expressive rights under the *Charter*. This does not by any means argue for an unlimited right on the part of lawyers to breach the legitimate public expectation that they will behave with civility.
2. We are, in other words, balancing the fundamental importance of open, and even forceful, criticism of our public institutions with the need to ensure civility in the profession. Disciplinary bodies must therefore demonstrate that they have given due regard to the importance of the expressive rights at issue, both in light of an individual lawyer’s right to expression and the public’s interest in open discussion. As with all disciplinary decisions, this balancing is a fact-dependent and discretionary exercise.
3. In this case, the 21-day suspension imposed on Mr. Doré is not before this Court, since Mr. Doré did not appeal it either to the Court of Appeal or to this Court. All we have been asked to determine is whether the Disciplinary Council’s conclusion that a reprimand was warranted under art. 2.03 of the *Code of ethics* was a reasonable one. To make that assessment, we must consider whether this result reflects a proportionate application of the statutory mandate with Mr. Doré’s expressive rights.
4. Lawyers potentially face criticisms and pressures on a daily basis. They are expected by the public, on whose behalf they serve, to endure them with civility and dignity. This is not always easy where the lawyer feels he or she has been unfairly provoked, as in this case. But it is precisely when a lawyer’s equilibrium is unduly tested that he or she is particularly called upon to behave with transcendent civility. On the other hand, lawyers should not be expected to behave like verbal eunuchs. They not only have a right to speak their minds freely, they arguably have a duty to do so. But they are constrained by their profession to do so with dignified restraint.
5. A reprimand for a lawyer does not automatically flow from criticizing a judge or the judicial system. As discussed, such criticism, even when it is expressed robustly, can be constructive. However in the context of disciplinary hearings, such criticism will be measured against the public’s reasonable expectations of a lawyer’s professionalism. As the Disciplinary Council found, Mr. Doré’s letter was outside those expectations. His displeasure with Justice Boilard was justifiable, but the extent of the response was not.
6. The Disciplinary Council recognized that a lawyer must have [translation] “total liberty and independence in the defence of a client’s rights”, and “has the right to respond to criticism or remarks addressed to him by a judge”, a right which the Council recognized “can suffer no restrictions when it is a question of defending clients’ rights before the courts” (paras. 68-70). It was also “conscious” of the fact that art. 2.03 may constitute a restriction on a lawyer’s expressive rights (para. 79). But where, as here, the judge was called [translation] “loathsome”, arrogant and “fundamentally unjust” and was accused by Mr. Doré of “hid[ing] behind [his] status like a coward”; having a “chronic inability to master any social skills”; being “pedantic, aggressive and petty in [his] daily life”; having “obliterate[d] any humanity from [his] judicial position”; having “non-existent listening skills”; having a “propensity to use [his] court — where [he] lack[s] the courage to hear opinions contrary to [his] own — to launch ugly, vulgar, and mean personal attacks”, which “not only confirms that [he is] as loathsome as suspected, but also casts shame on [him] as a judge”; and being “[un]able to face [his] detractors without hiding behind [his] judicial position”, the Council concluded that the [translation] “generally accepted norms of moderation and dignity” were “overstepped” (para. 86).
7. In the circumstances, the Disciplinary Council found that Mr. Doré’s letter warranted a reprimand. In light of the excessive degree of vituperation in the letter’s context and tone, this conclusion cannot be said to represent an unreasonable balance of Mr. Doré’s expressive rights with the statutory objectives.
8. I would dismiss the appeal with costs.

*Appeal dismissed with costs.*

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